NO. 45126-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNY FULLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello
The Honorable Stanley Rumbaugh

No. 12-1-03439-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the hung jury mistrial on a separately charged alternative means of assault resulted in continuing jeopardy?

B. STATEMENT OF THE CASE.

1. Procedure

On September 12, 2012, the Pierce County Prosecuting Attorney (State) charged Johnny Fuller, the defendant, with one count of assault in the second degree. CP 1. The State later amended the Information to add charges of possession and trafficking in stolen property. CP 3-5. Prior to trial, the State again amended the Information to charge two counts of assault in the second degree, each by different means: with a deadly weapon; and inflicting substantial bodily harm. CP 51-53. The State also reduced the property crimes to one count of trafficking and one count of possession of stolen property. *Id.*

Trial began on May 14, 2012, Hon. Jerry Costello presiding. 1 RP 4. After hearing all the evidence, the jury acquitted the defendant on Count II (assault causing bodily injury), Count III (trafficking in stolen property), and Count IV (possession of stolen property). CP 116, 118, 120. The jury deadlocked regarding Count I (assault with a deadly weapon). CP 131. The court declared a mistrial on Count I, regarding the hung jury. *Id.*

The case was reassigned to Hon. Stanley Rumbaugh for a new trial on Count I. 7/11/2013 RP 3. The defendant moved to dismiss Count I, arguing a violation of Double Jeopardy. CP 124-125. After hearing argument, the court denied the motion. CP 131. The trial was stayed pending appeal of the issue. CP 154-156.

2. Facts

Vincent Nix lived in the Salishan neighborhood of East Tacoma with his family, including his seven-year-old son. 2 RP 129. Nix's son had a bicycle decorated like a Harley-Davidson motorcycle. *Id.* The bike had flat tires and had been left outside by the front door. 2 RP 130-131.

On September 10, 2012, Nix noticed the bike was gone. 2 RP 133. Later that day, he heard that the bike might be at a nearby neighbor's residence. 2 RP 135. On September 11, 2012, Nix walked to the residence, that of the defendant, who was outside. 2 RP 137.

The defendant had many bicycles in his yard, covered by a blue tarp. 2 RP 138. Nix asked the defendant if he sold bikes. 2 RP 139, 142. The defendant replied that he did. He lifted the tarp to show the bikes and told Nix to take his pick. 2 RP 142. Nix asked about a "motorcycle" bike for his son. *Id.* The defendant responded by bringing what Nix recognized as his son's bike out to show him. 2 RP 140. The defendant offered to sell it for $20, and then agreed to $10. 2 RP 141. Nix said he would come back with the money. *Id.*

Nix knew that the bicycle of Robert Scott's daughter, another neighbor child, was also missing. 2 RP 143, 183. Nix went to tell Scott that the bike might be at the defendant's house. *Id.* Nix and Scott drove back to the defendant's to check out the bikes. 2 RP 144.

As Nix spoke with the defendant, Scott tried to look under the tarp to see if his daughter's bike was there. 2 RP 145, 188. Nix told the defendant that the "Harley-Davidson" bike belonged to his son. 2 RP 146. The defendant told Nix to take it. 2 RP 148.

Scott asked to see more of the bikes. 2 RP 149. He asked specifically regarding a "princess" decorated bike. 2 RP 190.

At that point the defendant asked Nix and Scott to leave. 2 RP 149, 190. Nix and Scott wanted to find out if the defendant also had Scott's daughter's bike. They told the defendant they were going to call the police and wait for them to arrive. 2 RP 192.

The defendant went into the house and armed himself with an aluminum baseball bat. 2 RP 150, 192. The defendant came outside brandishing the bat. 2 RP 150, 193. The defendant approached Nix, who backed up. 2 RP 151. The defendant then approached Scott and struck him in the arm with the bat. 2 RP 153, 194. Scott struggled with the defendant and disarmed him. 2 RP 154, 198. Nix called 911 for police and medical aid. 2 RP 156, 199. Scott's injury required medical attention and later surgery. 2 RP 201, 202.

C. ARGUMENT.

1. DOUBLE JEOPARDY DOES NOT BAR THE STATE FROM TRYING THE DEFENDANT A SECOND TIME FOR ONE COUNT OF ASSAULT WHERE A JURY DEADLOCK RESULTED IN MISTRIAL.

a. Double Jeopardy generally.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." It protects against being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense. *See*, ***North Carolina v. Pearce***, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969). Art. 1, § 9 of the Washington State Constitution has a similar Double Jeopardy Clause. It provides that no person shall "be twice put in jeopardy for the same offense."

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and the double jeopardy clause of Article I, section 9 of the Washington Constitution provide the same protection. ***State v. Gocken***, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Claims of double jeopardy are questions of law that are reviewed de novo. *See* ***State v. Kelley***, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

Two types of double jeopardy violations may arise where the State charges the defendant with multiple crimes based upon the same action: "Unit of prosecution" violations occur where a defendant is twice convicted for the same offense, e.g., two counts of robbery for the same action; and "same offense" violations occur where a defendant is convicted of two offenses that require merger upon conviction, e.g., a count of felony murder and a count on the underlying robbery for the same action. *See* ***In re Personal Restraint of Francis***, 170 Wn.2d 517, 522 n. 2, 242 P.3d 866 (2010).

Here, the defendant argues that the State violates the Double Jeopardy protections by prosecuting him a second time for the same offense after acquittal. App. Br. at 8. Specifically, the defendant maintains that because both counts are the same unit of prosecution, the acquittal on Count II includes Count I. *Id.*

The defendant must demonstrate three elements to show that his double jeopardy rights were violated: (1) jeopardy must have previously attached, (2) jeopardy must have previously terminated, and (3) the defendant is again being put in jeopardy for the same offense. *See* ***State v. Daniels***, 160 Wn.2d 256, 156 P.3d 905 (2007).

b. <u>Jeopardy has not terminated in Count I</u>.

There is no dispute that jeopardy does not terminate when the trial judge discharges the jury because there was a manifest necessity;

specifically, as, here, a hung jury. *See* ***State v. Strine***, 176 Wn.2d 742, 757, 293 P.3d 1177 (2013); ***State v. McPhee***, 156 Wn. App. 44, 56, 230 P.3d 284 (2010). Therefore, the State may retry a defendant for the same crime where a trial ends in a hung jury. *Id.* In the present case, there was a mistrial for a hung jury regarding Count I, therefore, jeopardy regarding that count has not terminated, but is continuing.

c. Counts I and II are alternative means of assault in the second degree.

The State may charge a crime by different or alternative means. *See* ***State v. Noltie***, 116 Wn.2d 831, 842, 839 P.2d 190 (1991). The State may charge, and try, multiple counts that may combine, merge, or be dismissed at sentencing. *See* ***State v. Kier***, 164 Wn.2d 798, 803, 194 P.3d 212 (2008); *see also* ***Ball v. U.S.***, 470 U.S. 856, 859, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985).

In the present case, for unknown reasons, the prosecuting attorney chose to charge different means of the same crime by charging separate counts. 7/11/2013 RP 19-20. The assault with the deadly weapon and the assault by injury constituted separate means of committing the crime of assault in the second degree under RCW 9A.36.021(1). Although the State may charge and try one crime by alternative means or different crimes that may merge, the State may only obtain one conviction. The analysis for determining unit of prosecution and merger are similar. While the analysis

is similar, both require multiple *convictions* before the court needs to make a final determination.

In cases where the State has charged multiple counts which may merge or be dismissed at sentencing, the defendant cannot dismiss the "extra" charge until the jury has made a final determination; which then requires the court's action. In ***State v. Michielli***, 132 Wn.2d 229, 937 P.2d 587 (1997), the Supreme Court discussed a similar issue regarding merger:

> The question of merger arises only after the State has successfully obtained guilty verdicts on the charges that allegedly merge—if the jury acquits on one of the charges, the merger issue never arises. The court cannot use the merger doctrine to dismiss a charge prior to trial because the court cannot predict which charges on which the defendant will be convicted.

Id., at 238-239. The same is true in the present case. The jury acquitted on one of the alternatives, leaving the second alternative, thereby obviating the issue. The jury terminated jeopardy regarding one alternative, but because of the hung jury mistrial, jeopardy continues regarding the second alternative.

Jeopardy regarding an alternative means is sometimes terminated by an Appellate Court. Where a crime is charged by alternative means and the Appellate Court finds insufficient evidence for one of the alternatives, the case is remanded for new trial regarding the surviving alternative. *See* ***State v. Garcia***, -Wn.2d - , 318 P.3d 266 (2014). Garcia was charged with burglary and kidnapping in the first degree. The kidnapping was charged

under three alternative means: intentionally abducting the victim with intent "(a) to hold [her] as a shield or hostage, or (b) to facilitate the commission of Burglary in the Second Degree or flight thereafter, or (c) to inflict extreme mental distress on [her]." 318 P.3d at 271. *See* RCW 9A.40.020(1).

Although the State was prohibited from retrying Garcia on the two alternatives where there was insufficient evidence, he was "entitled only to a new trial, not an outright acquittal, unless the record shows the evidence was insufficient to convict on any charged alternative." 318 P.3d at 275. Here, much like ***Garcia***, Double Jeopardy bars the State from retrying the defendant after acquittal of one alternative means, but not after a hung jury as to the other.

In ***State v. Ramos***, 163 Wn.2d 654, 184 P.3d 1256 (2008), in different circumstances, the Supreme Court came to a similar conclusion. Ramos was charged with murder in the first degree. The trial judge instructed on the lesser degree offense of second degree murder by the alternative means of intentional murder and felony murder predicated on assault. In rendering its verdict, the jury left the first degree murder verdict form blank and found Ramos guilty of the lesser charge, second degree murder. The State had the jury answer a special interrogatory regarding the alternative means for second degree murder. *Id.*, at 658. The jury answered that they were not unanimous as to intentional murder, but they were as to felony murder. *Id.*

The felony murder conviction was reversed under ***In re Personal Restraint of Andress***, 147 Wn.2d 602, 56 P.3d 981 (2002). The State decided to recharge the defendants with first degree manslaughter. The defendant contended that the jury in the prior trial actually or impliedly acquitted him of second degree murder and, consequently, double jeopardy principles bar recharging him with the lesser included offense of manslaughter. Because the record did not establish that the jury was unanimous as to the valid alternative in rendering its verdict, double jeopardy did not bar retrial on the remaining, valid alternative. ***Ramos***, 163 Wn.2d at 660. This is the case even when one alternative means has been reversed on appeal due to a finding of insufficient evidence, a finding that has the same double jeopardy implications as an outright acquittal in other circumstances. *Id.*, at 661.

In ***Ramos***, as in the present case, even though the defendant was not guilty of one means of committing the crime, Double Jeopardy was not a bar to prosecution of another means because jeopardy continued; it had not terminated. There was no final decision regarding the alternative means: no implied acquittal in Ramos; no agreement in the present case. As in ***Ramos***, the defendant in the present case cannot legally or factually demonstrate an implied acquittal, or termination of jeopardy. The jury deadlock showed that they considered the alternative in Count I, but could not make a final decision.

The issue in this case is not unit of prosecution of assault. The State did not and does seek more than one conviction for the defendant's act of assaulting Mr. Scott with a baseball bat. The State is not retrying the defendant after acquittal. If the defendant had been convicted or acquitted of both counts and the State wished to enforce both convictions, or retry him, the parties and the Court would analyze the unit of prosecution of assault and the application of cases such as ***State v. Westling***, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); ***State v. Adel***, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998); ***State v. Gatlin***, 158 Wn. App. 126, 135, 241 P.3d 443 (2010), *review denied*, 171 Wn. 2d 1020 (2011); and ***State v. Smith***, 124 Wn. App. 417, 432, 102 P.3d 158 (2004), all of which resulted in multiple convictions. But this is unnecessary where the defendant has not been convicted once, let alone twice; and only acquitted of one means charged.

The issue in this case is whether the hung jury mistrial on a separately charged alternative means resulted in continuing jeopardy. The trial court correctly understood the issue. 7/11/2013 RP 36-37. The jury verdict terminated jeopardy regarding only one of the two counts/alternatives charged. The other count/alternative has yet to be decided by the jury. Therefore, the case is properly pending trial.

D. CONCLUSION.

The trial court properly denied the defendant's motion to dismiss Count I because jeopardy has not terminated on that count. The State

respectfully requests that the trial court be affirmed and the case proceed to trial.

DATED: March 13, 2014

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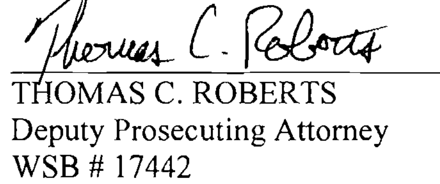

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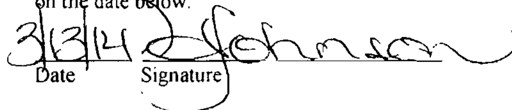

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